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Nos. 74-6632 and 75-5215

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

MINOR MOODY, PETITIONER

v.

LOREN DAGGETT, WARDEN

ASHLEY GADDY, PETITIONER

v.

GEORGE MICHAEL, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND FOURTH CIRCUITS

MEMORANDUM FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals in No. 74-6632 (Moody) is unreported. The opinion of the court of appeals in No. 75-5215 (Gaddy) is reported at 519 F.2d 669.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1975 in Moody and on July 7, 1975 in Gaddy. The petition was filed on June 2, 1975 in Moody and on August 5, 1975 in Gaddy. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires the Parole Board to hold an oral parole revocation hearing before it can revoke the parole of a parolee convicted of an offense committed while on parole.

2. If such a hearing must be held, whether it can be deferred until the parolee has completed serving the sentence imposed for the intervening crime.

3. If a hearing must be held promptly following conviction for the intervening crime, whether the parolee is entitled to immunity from revocation because of delay in holding his hearing.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

18 U.S.C. 4205 provides:

> A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

18 U.S.C. 4207 provides:

> A prisoner retaken upon a warrant issued by the Board of Parole shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

The United States Parole Board's regulation relating to detainers 28 C.F.R. 2.53 provides:

> (a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.
>
> (b) Following the dispositional review the Regional Director may:
>
> (1) Let the detainer stand;
>
> (2) Withdraw the detainer and close the case if the expiration date has passed;
>
> (3) Withdraw the detainer and reinstate to supervision, thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release;
>
> (4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.
>
> (c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual review relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

STATEMENT

1. No. 74-6632.

On February 12, 1962, petitioner Moody was sentenced in the United States District Court for the District of Arizona to a term of ten years' imprisonment. He was paroled on April 11, 1966. On December 6, 1971 petitioner was convicted and sentenced in the

United States District Court for the District of Arizona to a term of ten years' imprisonment upon his plea of guilty to an indictment charging manslaughter and second degree murder. Petitioner was incarcerated at the United States Penitentiary at Leavenworth, Kansas; the Board of Parole promptly issued a parole violator warrant, which it lodged against petitioner as a detainer. Petitioner asked the Board to execute the parole violator warrant, alleging that any additional imprisonment for violation of the terms of his parole should run concurrently with the 1971 sentence he is now serving. The Board responded that it did not desire to take petitioner into its custody until he had been released from his 1971 manslaughter and murder sentence. The Board restated its intention in April 1974 following the yearly review of petitioner's case provided by the Board's regulations (28 C.F.R. 2.53(a)).

On July 22, 1975, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas, seeking to compel the United States Board of Parole to dismiss the parole violator warrant on the grounds that the delay in holding the revocation hearing had deprived him due process of law. The district court dismissed petitioner's action, and the court of appeals affirmed (Pet. App. A), following its earlier opinion in Small v. Britton, 500 F.2d 299 (C.A. 10), which held that the Due Process Clause does not require a hearing until the parole violator warrant is executed.

2. No. 75-5215.

On April 3, 1970, petitioner Gaddy was sentenced to a term of four years' imprisonment for uttering counterfeit obligations of the United States. On October 17, 1972, petitioner was released (by virtue of accumulated "good time") pursuant to 18 U.S.C. 4163; under 18 U.S.C. 4164 a prisoner so released is treated as a parolee until the expiration of his maximum sentence. Petitioner

had a maximum of 423 days remaining to be served on his sentence at the time of his release.

Less than five months later he was arrested and incarcerated in North Carolina for passing forged checks. He was convicted on state charges on March 14 and 15, 1973. On April 10, 1973, a parole violator warrant was issued by the United States Board of Parole and lodged against him as a detainer. Petitioner was notified that the detainer had been filed.[1/] On April 17, 1973, he was advised that he had a right to submit information to the Board of Parole relative to the parole violation. He made no attempt to avail himself of this administrative remedy (Pet. App. 21). On May 28, 1974, North Carolina released petitioner to the custody of the United States. The Board of Parole executed the warrant; petitioner received a hearing before an officer of the United States Probation Office in Charlotte, North Carolina, who found probable cause for revoking parole. Petitioner was subsequently transferred to the federal penitentiary at Danbury, Connecticut. On August 30, 1974, a parole revocation hearing was conducted at that prison, and petitioner's parole was revoked.

On August 14, 1974, the United States District Court for the District of North Carolina issued a memorandum and opinion (Pet. App.) in response to a December 17, 1973 pro se "Complaint for Declaratory Judgment and Injunctive Relief" in which petitioner had claimed that he should have been afforded a parole revocation hearing in 1973. The district court held that, even where the parolee had been convicted of an intervening offense, Morrissey v. Brewer, 408 U.S. 471, requires the Board to conduct its revocation hearing and render a decision within sixty days after the issuance of the parole violator warrant. The court of appeals reversed, holding that since the delay of the hearing to allow petitioner

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1/ Petitioner was convicted on other North Carolina charges on April 20, 1973, and in May 1973.

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to serve his intervening sentence was not unreasonable, and petitioner had suffered no prejudice due to the delay, he was not entitled to any relief.

DISCUSSION

The issues presented in these cases are the subject of major disagreement among the circuits. Their resolution, either by this Court or by Congress, is necessary in order to relieve the Board of Parole from the conflicting directives from the courts of appeals regarding both the manner in which it may make decisions to revoke the parole when the parolee has been convicted of a crime committed while on parole and the remedy when it has neglected to act with sufficient dispatch. Until the Board's obligations are clarified, it will be confronted with numerous judicial proceedings and will face the possibility that some individuals may escape revocation altogether although in the Board's judgment the interests of society require revocation.

1. The Eighth Circuit has held in Cleveland v. Ciccone, 517 F.2d 1082, that a parole revocation hearing must be held promptly after a detainer has been filed against a parolee in state or federal custody on an intervening charge or conviction. The court apparently held that the hearing should follow promptly upon issuance of the violator warrant, whether or not the warrant is lodged as a detainer. However, concluding that its decision, like that of Morrissey itself, should not be applied retroactively, the court of appeals declined to quash the warrants and simply ordered the Board to hold prompt hearings.[2/] The Board is complying with this decision within the States making up the jurisdiction of the Eighth Circuit.

2/ Other panels of the Eighth Circuit have followed a similar course, ordering the Board to hold prompt hearings but not ordering the Board to release the parole violator. See United States ex rel. Martin v. Saxbe, No. 75-1311, decided July 9, 1975; United States ex rel. Williams v. Saxbe, No. 74-1999, decided July 24, 1975.

(6)

The Seventh Circuit has adopted a different approach. United States ex rel. Hahn v. Revis, No. 74-1057, decided July 25, 1975, held that the Board must offer the parolee a hearing within three months "after the parolee's conviction establishes the parole violation" (slip op. 8-9, n. 5). The date on which a violator warrant is issued apparently is not pertinent to this analysis.[3/] After the hearing, the court held, the Board could decide to withdraw the warrant, execute the warrant (and so make the term for parole violation run concurrently with the term for the intervening offense), or defer execution of the warrant (thereby making the term for parole violation run consecutively to the term for the intervening offense).[4/] The court expressly rejected the Board's argument that a prompt "dispositional review," without an oral hearing, adequately protects the parolee's legitimate interests. Because the Board had not furnished the parolee with a prompt personal hearing, the court ordered him released from custody.

The Third and Fourth Circuits take still another position. In petitioner Gaddy's case the Fourth Circuit adopted an ad hoc balancing approach similar to that followed in speedy-trial cases (see Pet. No. 75-5215 App. 7-8); the court held that because delay may help as well as harm a parole violator, the mere presence of delay, in the absence of demonstrable prejudice, is not a ground for permitting a parole violator to avoid serving the remainder of his term. See also Orr v. Saxbe, C.A. 3, No. 75-1042, 75-5594

3/ The court declined to express an opinion on the proper timing of a hearing should the parolee be acquitted of the charge of an intervening crime. See In re Valrie, 12 Cal. 3d 139, 115 Cal. Rptr. 340, 523 P.2d 812, certiorari denied sub nom. Procunier v. Valrie, 420 U.S. 938 (hearing should be held promptly after arrest for an intervening offense).

4/ The Fourth Circuit has held in Gaddy that the Board possesses this full menu of choices. The Eighth Circuit apparently assumed in Cleveland, however, that the Board must either withdraw or execute the warrant promptly after holding the hearing. Such a result effectively deprives the Board of any meaningful sanction for parole violations that also constitute independent crimes for which the parolee is convicted and imprisoned.

(7)

decided June 17, 1975, affirming per curiam, M.D. Pa., Civ. No. 74-341, decided November 27, 1974, holding that a parole violator must demonstrate prejudice amounting to "grievous loss" in order to be entitled to relief.

Finally, the Fifth, Sixth, and Tenth Circuits have held that Morrissey is inapplicable where there has been an intervening offense, and that the Constitution does not require a revocation hearing until the parole violator warrant is executed. Cook v. Attorney General, 488 F.2d 667 (C.A. 5), certiorari denied, 419 U.S. 848; Colangelo v. Board of Parole, C.A. 6, No. 75-1279, decided July 16, 1975; Small v. Britton, 500 F.2d 299 (C.A. 10).[5/] We submit that Cook, Colangelo and Small have adopted the correct approach.

2. A parolee who is convicted of a crime while on parole is not entitled to a hearing at any time if the Board decides to revoke his parole because of that conviction. The Fifth Amendment provides that no person shall be deprived of "liberty" or "property" without due process of law. As we have argued in our brief amicus curiae in Weinstein v. Bradford, No. 74-1287, the decision whether to grant or deny parole is discretionary; no set of facts establishes an entitlement to be granted parole and, therefore, an applicant for parole is not entitled to a hearing at which he could attempt to prove particular facts.[6/] See Board of Regents v. Roth, 408 U.S. 564. See also Arnett v. Kennedy, 416 U.S. 134, 181 (White, J., concurring and dissenting):

5/ The questions presented by the instant cases also are presented in cases pending in two other courts of appeals. See Jones v. Johnston, 368 F. Supp. 579 (D.D.C.), appeal pending, C.A.D.C., No. 74-1424; Byrd v. Sigler, 372 F. Supp. 889 (D.D.C.), appeal pending, C.A.D.C. No. 74-1517; Murine v. Sigler, appeal pending, C.A. 9, No. 74-2541; Reese v. United States Board of Parole, appeal pending, C.A. 9, No. 74-2418.

6/ Copies of our brief in Weinstein are being furnished to petitioners.

(8)

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

The same analysis is applicable when parole is revoked because of conviction for a crime committed while on parole. Morrissey held that, because parole is a form of "liberty" subject to defeasance only if the government can demonstrate that the parolee violated the conditions of his parole, a hearing is required so that the parolee can present his version of disputed facts relevant to whether he has violated those conditions. But once it has been established that the parolee violated the conditions of his parole, the factual basis for revocation of parole has been established, and the parole authorities are left with a purely discretionary determination whether to revoke parole or not to revoke it; no fact or set of facts that the parolee can prove will entitle him not to have his parole revoked.

A parolee's conviction for a crime while on parole conclusively establishes that he has violated the conditions of his parole. As the Court noted in Morrissey, supra, 408 U.S. at 490, a parolee convicted of an intervening offense "[o]bviously * * * cannot relitigate issues determined against him in other forums, as in the situation presented when a revocation is based on conviction of another crime." And, as Morrissey held when remanding for a hearing, if the record on remand established that the parolees had violated the conditions of their paroles, "that would end the matter" (ibid.). The Court did not hold in Morrissey that the parolee must be accorded a hearing on whether the parole board should exercise its discretion not to revoke the parole of one who had violated the conditions of his parole.[7/] Once the violation of

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7/ The Court indicated in Morrissey (408 U.S. at 480, 483-484) that personal hearings on parole revocation would be useful because, among other things, they may provide information helpful to the parole authorities in exercising their discretion whether or not to revoke

(Footnote continued on next page)

the conditions of parole has been established--by a confession of the alleged violator, by a conviction for an intervening crime, or by evidence introduced at a Morrissey hearing--the parole authorities are entitled to revoke parole without further hearings.[8/] If the Board is under no constitutional obligation to hold any hearing, a fortiori it is under no obligation to hold a prompt hearing.

3. Even if a hearing must be provided at some point, it does not follow that this hearing must be provided promptly after the issuance of the violator warrant (as the Eighth Circuit held) or the conviction for the intervening crime (as the Seventh Circuit held). The parolee is not deprived of any "liberty" by the Board until the warrant is executed. Although an imprisoned parole violator surely has been deprived of his liberty, that deprivation was occasioned by his arrest and conviction for the intervening crime, not by the issuance of the Board's parole violator warrant. The Board's decision to revoke or not to revoke, or even the absence of a decision, will not affect the parolee's liberty until the conclusion of the intervening sentence. Only then is the parole violator "deprived" of his "liberty" by the Board, and only then could the Constitution require a hearing. Cf. Anderson v. Corrall, 263 U.S. 193, 196.

(Footnote continued from preceding page)

the parole of one who has violated the conditions of his parole. We do not dispute that this is frequently so, and the Parole Board often holds hearings for this purpose alone. Taken in context, however, the Court's observation simply points to certain potential advantages of hearings and does not hold that the Constitution requires a hearing when the fact of parole violation has been established by other means.

8/ Accord, Shadbolt v. Michigan Department of Corrections, 386 Mich. 232, 235-236. See also Swift v. Ciccone, 477 F.2d 577 (C.A. 8) (no need for a hearing to forfeit good time after a conviction for crime or revocation of parole).

It may be that 18 U.S.C. 4207 requires a hearing before the Board can exercise its discretion to revoke parole, even if its action is based upon an intervening conviction. That statute, however, comes into play only after the Board has "retaken" an individual by executing the violator warrant; it does not compel the Board to provide a prompt hearing during the time a parole violator is confined pursuant to the intervening conviction and before the Board decides whether to execute the warrant.

4. To the extent the Constitution requires the Board to consider prior to the expiration of the intervening sentence whether to revoke parole, we submit that the Board's current procedures satisfy the constitutional command. Under 28 C.F.R. 2.53, a parolee convicted and imprisoned for an intervening crime may petition the Board to execute or dismiss the outstanding violator warrant. He may also submit evidence in support of his claim. Most decisions can be made adequately at this point, without the need for an oral hearing. If the Board concludes that additional evidence would be helpful in considering the application, however, the Regional Director designates a hearing examiner to conduct a personal interview of the parolee. In all cases the Board reviews the parolee's status annually.

This administrative procedure strikes a proper balance between the legitimate interests of the parolee and those of the administrative system. Any person who can demonstrate the need for an immediate hearing is entitled to receive such a hearing, while hearings for other violators are deferred until the conclusion of the intervening term, when the Board will have access to new information about the violator's conduct during his imprisonment that may be crucial to the Board's decision whether to revoke parole or to dismiss the warrant.[9/] As Morrissey held (408 U.S. at 481), "due process is flexible and calls for such procedural protections as the particular situation demands." The Board's rules are fair and provide more than ample protection for the interests of those few prisoners whose presentation to the Board would be prejudiced if a full oral hearing were delayed until the expiration of their intervening sentence.

9/ Ordinarily, when the parole violation is of the gravity of commission of a new crime leading to imposition of a sentence of imprisonment, an immediate hearing could sensibly lead to no result other than revocation consecutive to the intervening sentence. A hearing thus is far more likely to be useful in aiding the Board in the exercise of its discretion if it occurs after service of the intervening sentence.

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5. The questions presented by these three petitions are of substantial practical importance to the operation of the Board. We have been informed that the Board revokes the parole of approximately 1000 persons yearly because of their convictions for crimes committed while on parole. The Board estimates that, if required to hold revocation hearings within 60 days of the intervening conviction, it would conduct approximately 800 hearings annually in state and local prisons, many of which are far from federal prisons and from any office of the Board. And, because the Board believes that the prisoner's conduct during the imprisonment for the intervening conviction is an important factor in deciding whether parole should be revoked, the Board would most likely hold additional hearings for each of these violators when the intervening sentence is completed. We therefore acquiesce in these petitions and ask the Court to resolve the conflict among the circuits.[10/]

6. Both the House and the Senate have passed bills that will revise the procedures of the Board of Parole. H.R. 5727 was passed by the House on May 21, 1975, and was amended and passed by the Senate on September 16, 1975. As amended, the bill provides in part (121 Cong. Rec. S15952 (daily ed. September 16, 1975)) that:

> Any parolee convicted of any Federal, State, or local crime committed subsequent to his release on parole and sentenced for such crime to a term or terms of imprisonment who has a detainer for a warrant issued under this section placed against him shall receive a revocation hearing within one hundred and eighty days of such placement, or promptly upon release from such commitment, whichever comes first.

10/ If the Court believes it appropriate to grant only one of the petitions and to defer disposition of the other, we suggest that it select No. 75-5215 (Gaddy), in which all of the delay took place after Morrissey, which is not retroactive.

(12)

The House bill contains a significantly different provision with respect to parole revocations; the House and Senate versions disagree on many other particulars. The two bills have been sent to a committee of conference. If a bill with a provision similar to the Senate amendment is reported, passed, and signed by the President, it would provide a statutory solution to the problems that have divided the circuits. 11/

The Office of Legislative Affairs has informed us that because of the considerable differences between the House bill and the Senate amendments the Conference Committee is not expected to resolve them and report quickly. The differences appear to be sufficiently great that a bill is unlikely to be transmitted to the President until some time during 1976; if the Court postpones granting certiorari until Congress has finally acted upon H.R. 5727, it will be unable to resolve the conflict among the circuits during the current Term. Moreover, the Parole Board is opposed to the Senate amendment set out above, and we have been informed that it will urge the Conference Committee to delete or alter it. In light of the differences between the House bill and the Senate amendments, the Conference Committee may well resolve the differences between the bills in a way that does not preempt the constitutional issues that have divided the circuits. Consequently, we believe that the Court should grant certiorari now, so that the Court can consider the issues this Term if H.R. 5727 does not become a law or if any bill finally enacted does not require the Board to alter its present procedures.

CONCLUSION

The petitions for writs of certiorari should be granted. If and when Congress has completed its consideration of H.R. 5727 and

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11/ The Senate version apparently would allow the Board to defer a hearing on parole revocation by declining to lodge a detainer; the 180 day timetable contained in the bill also is longer than the timetable established by the Seventh and Eighth Circuits. However, these circuits may wish to reconsider their decisions in light of the intervening legislation rather than to hold the legislation unconstitutional.

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the President has signed or vetoed the bill, we will submit a supplemental memorandum discussing the applicability of the Act to these cases and whether resolution by this Court still appears to be necessary or desirable.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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